

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRENDA SMITH O'SHEA

Claimant

VS.

U.S. SHOE CORPORATION

Respondent

AND

LIBERTY MUTUAL INSURANCE COMPANY

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 187,861

ORDER

The applications of the respondent and the Kansas Workers Compensation Fund for review by the Workers Compensation Appeals Board of the Award entered by Administrative Law Judge Robert H. Foerschler dated April 28, 1997, came on for consideration.

APPEARANCES

Claimant appeared not having resolved this matter with respondent by an Agreed Award dated May 15, 1995. Respondent and its insurance carrier appeared by and through their attorney, Stephanie Warmund of Overland Park, Kansas. The Kansas Workers Compensation Fund (Fund) appeared by and through its attorney, Bruce D. Mayfield of Overland Park, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

1. Whether claimant suffered one continuous accidental injury or two separate accidental injuries.
2. The liability of the Fund.
3. The liability of the Fund for future medical care owed to claimant as a result of the 1989 injury.
4. Whether the Administrative Law Judge erred in considering the medical report of Dr. Roger P. Jackson which was attached to the Agreed Award but not otherwise admitted into evidence in this matter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary file herein, and, in addition, the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

With regard to the issues dealing with whether claimant suffered accidental injury on one date or two and the liability of the Fund, the Appeals Board finds that the Award of the Administrative Law Judge sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The findings and conclusions enumerated in the Award of the Administrative Law Judge are both accurate and appropriate and the Appeals Board adopts same as its own findings and conclusions as if specifically set forth herein.

The Appeals Board finds when considering the medical reports from Edward J. Prostic, M.D., the medical opinion of Garth S. Russell, M.D., and the testimony of the claimant, that claimant suffered accidental injuries on both December 4, 1987, and on December 4, 1989. While claimant did have ongoing symptomatology after the earlier back surgery, this was to be expected according to Dr. Russell. Claimant testified that the symptoms subsequent to the 1989 injury became more severe. The 1989 accident required claimant to undergo two additional surgeries, both more invasive than the surgery performed in 1987. Dr. Russell opined that the combined bending and twisting actions at work in 1989 were sufficient to cause claimant additional injury. Dr. Prostic stated that the 1989 incident aggravated or accelerated claimant's condition. Dr. Prostic also felt claimant suffered additional functional impairment as a result of the 1989 incident.

With regard to whether or not the Fund is liable for the 1989 incident, the medical opinion of Dr. Prostic is uncontradicted. He felt that "but for" the preexisting condition, claimant would not have suffered the injury to the extent she was injured on December 4, 1989. It is further well supported in the record that the respondent was fully aware that claimant had ongoing symptoms subsequent to the 1987 accident and had been given a 15 percent functional impairment rating by Dr. Russell. The Fund's objection to Dr. Russell's opinion because it was not based upon the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition, Revised is not well supported as the legislative mandate found in K.S.A. 44-510e that the Guides be used was not enacted until 1993, approximately four years after Dr. Russell examined and rated claimant. Dr. Russell's medical opinion was based upon the American Academy of Orthopedic Surgeons Guide which, at that time, was an accepted method of providing ratings in workers compensation matters. As such, the Workers Compensation Fund's objection to the functional impairment rating of Dr. Russell is overruled and the opinion of Dr. Russell will be considered in this matter. The Appeals Board finds claimant suffered a 15 percent whole body functional impairment as a result of the injury suffered in 1987 with additional aggravation from the new injury in 1989. The Appeals Board further finds that "but for" the claimant's prior handicapped condition, the 1989 injury would not have occurred and the Fund is responsible for 100 percent of the liability stemming from the 1989 accident.

The Appeals Board further finds that, based upon the opinion of Dr. Prostic and Dr. Russell, the Fund should be liable for any future medical expense stemming from the 1989 incident, with this medical expense to be awarded to claimant upon application to and approval by the Director.

With regard to the method of computing the Fund liability, the Award of the Administrative Law Judge must be modified. In considering what portion of the total liability should be assessed to the Fund, the Administrative Law Judge considered the opinion of Roger P. Jackson, M.D., which was attached to the Agreed Award, and which rated claimant at 35 percent to the body as a whole. The Administrative Law Judge used the comparison between Dr. Russell's 15 percent and Dr. Jackson's 35 percent to find the Fund liable for 4/7th of the total \$100,000 Agreed Award. The Appeals Board rejects this computation based upon the fact that the medical opinion of Dr. Jackson, while stipulated to in the Agreed Award, was never placed into evidence for any other purpose. K.S.A. 1989 Supp. 44-519 precludes the use of a medical opinion in workers compensation matters absent a stipulation by the parties or absent the testimony of the health care provider being taken to support the medical opinion. As such, the 35 percent functional impairment rating of Dr. Jackson cannot be considered for purpose of this award. In computing the liability of the Fund, the Appeals Board must look to the evidence which is available in the record. Dr. Russell found claimant to have suffered a 15 percent whole body functional impairment from the 1987 incident. Both Dr. Russell and Dr. Prostic felt claimant's condition had worsened, with Dr. Prostic specifically stating that claimant's functional impairment was higher than the original 15 percent given by Dr. Russell and "but for" this prior condition the 1989 injury would not have occurred. As such, any additional compensation awarded above the 15 percent whole body functional impairment rating of Dr. Russell will be the responsibility of the Fund.

BRENDA SMITH O'SHEA

4

DOCKET NO. 187,861

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated April 28, 1997, should be, and is hereby, modified as above stated and the Kansas Workers Compensation Fund shall reimburse respondent as follows:

For the total settlement of \$100,000 including both temporary total and permanent disability, the responsibility of the respondent shall be \$35,769.54 which includes the temporary total disability compensation of \$1,462.85 paid for the 1987 injury as well as \$34,306.69 which constitutes the 15 percent whole body functional impairment based upon an average weekly wage of \$838.18. Respondent shall be reimbursed for \$64,230.46 which is the total awarded to claimant above the 15 percent functional impairment to the body plus the temporary total disability compensation paid for the 1989 injury. In addition, respondent is entitled to reimbursement for medical expenses in the amount of \$56,687.72 and temporary total disability compensation in the amount of \$40,843.20 both for the injury suffered by claimant in December 1989, making a total reimbursement due and owing to respondent from the Fund in the amount of \$161,761.38.

The costs of the transcripts in the record shall be assessed against the respondent and its insurance carrier as follows:

Hostetler & Associates, Inc.	\$754.22
Metropolitan Court Reporters, Inc.	\$110.90

IT IS SO ORDERED.

Dated this ____ day of August 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Leah Brown Burkhead, Mission, KS
Stephanie Warmund, Overland Park, KS
Bruce D. Mayfield, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director